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In The Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1180

DIVISION OF VOCATIONAL REHABILITATION, DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, STATE OF FLORIDA, and DIVISION OF RISK MANAGEMENT, DEPARTMENT OF INSURANCE, STATE OF FLORIDA,

Petitioners,

vs.

WILBUR KENYARD THOMAS and INDUSTRIAL RELATIONS COMMISSION, STATE OF FLORIDA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BLEED THROUGH

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Wilbur Kenyard Thomas, opposes the Petition for a Writ of Certiorari filed before this Court by Petitioners, Division of Vocational Rehabilitation, Department of Health and Rehabilitative Services, State of Florida, and Division of Risk Management, Department of Insurance, State of Florida. The reports of opinions delivered in the Courts below as set

forth in the Petition for a Writ of Certiorari is adopted by Respondent.

JURISDICTION

Respondent takes no issue with the statement of Petitioners that jurisdiction is dependent on whether rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution have been violated by the decisions below.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners have correctly stated and in the Appendix to the Petition for Certiorari correctly set out the constitutional provisions involved.

QUESTIONS PRESENTED FOR REVIEW

1. Whether it is a violation of due process for an Industrial Relations Commission to reverse and remand a decision of a Judge of Industrial Claims which is unsupported by a record?

2. Whether it is a violation of equal protection for an industrial relations commission to reverse and remand a decision of a Judge of Industrial Claims which is unsupported by a record?

CONCISE STATEMENT OF THE CASE

The appendix is affixed at the end of the Petition for Writ of Certiorari filed by Petitioners rather tl an separately bound.

It contains pages 1a through 21a and will be referred to herein as "App." followed by the page number.

The case arose from a workmen's compensation claim filed by Respondent Thomas. A hearing was held on that claim on January 28, 1975 before the Honorable Thomas J. Carroll and a compensation order was entered on February 14, 1975.[1] In an ensuing appeal to the Florida Industrial Relations Commission it was revealed that there had been mechanical failure in the recording device used at the hearing and therefore it was impossible to make a transcription of the testimony at the hearing.

On the basis that there was no record on which to ascertain whether the Compensation Order was supported by the testimony, the Industrial Relations Commission remanded jurisdiction back to the Judge of Industrial Claims "for the purpose of conducting such further proceedings as are necessary and proper."[2]

Petitioners herein, the employer of respondent and the insurance carrier for the employer, filed a petition with the Florida Supreme Court for a writ of certiorari.[3] That petition was denied by the Florida Supreme Court[4] and the employer and carrier have now petitioned this Court for a writ of certiorari.

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1. App. 11a - 19a
2. App. 8a - 9a
3. App. 3a - 7a
4. App. 1a - 2a

ARGUMENT

1. WHETHER IT IS VIOLATION OF DUE PROCESS FOR AN INDUSTRIAL RELATIONS COMMISSION TO REVERSE AND REMAND A DECISION OF A JUDGE OF INDUSTRIAL CLAIMS WHICH IS UNSUPPORTED BY A RECORD?

A formal hearing was held on the workmen's compensation claim of respondent appealed from the ensuing compensation order. The Judge of Indus trial Claims certified that because of a mechanical failure of the recording device used at the hearing it was impossible to make a transcription of the testimony. Therefore, the Florida Industrial Relations Commission remanded the case back to the Judge of Industrial Claims for the purpose of conducting "such further proceedings as are necessary and proper."

Under Florida law it is the duty of the State to provide for reporting of the proceedings and preparation of the record of the hearings. Florida Statutes, Section 440.29(2) provides:

> "(2) Hearings before the division shall be open to the public and *shall be reported,* and the division is authorized to contract for the reporting of such hearings. *The division shall by regulation provide for the preparation of a record of the hearings and other proceedings before it* and shall be permitted to charge for transcripts of testimony and copies of any instrument the same fees as are allowed by law to reporters and clerks of courts of this state for like services."
> (emphasis supplied)

The cause was remanded because the respondent's Application for Review could not be acted upon by the Industrial

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Relations Commission without a record of the proceedings before the Judge of Industrial Claims. It was the responsibility of the Department of Labor to provide that record, not the respondent and he can in no way be held at fault for the lack of a record.

The Supreme Court of Florida has previously ruled in two compensation cases that lack of a record requires a hearing de novo because there can be no review without a transcript. In the first case it was held:

> "The respondent employer filed timely application for review of the award for permanent partial disability compensation herein, and subsequently learned that it would be impossible to obtain a transcript of testimony because of the disappearance of the reporter, illegibility of his notes, and lack of other record of the proceedings. Motion for hearing de novo was thereupon filed.
>
> "This motion was, in our opinion, very properly granted in conformity with the affirmative requirements of the compensation law, F.S. Sections 440.29(2), 440.02(8) and 440.25, F.S.A., that testimony shall be reported and orders reviewed upon a transcript."
>
> *Lieber v. Morris Liebe, Inc.*
> 168 So. 2d 313, (Fla. 1964).

The second and more recent case involved a situation similar to that presented in this cause. The hearing before the Judge of Industrial Claims was recorded on tape and the reporter was unable to transcribe the testimony without many omissions for inaudible sections of the tape recording. The Court held:

"The instant case bears a striking similarity to the situation in *Lieber v. Morris Lieber, Inc.*, 168 So. 2d 313 (Fla. 1964). In that case, the employer filed timely application for review with the Commission and subsequently it was learned that it would be impossible to obtain a transcript of the testimony taken before the Claims Judge because of the disappearance of the reporter, the illegibility of his notes, and lack of other record of the proceedings, . . .

"Turning to the case sub judice, we observe that the hearing before the Industrial Claims Judge was recorded on tape. As transcribed in the record, this hearing consists of 15 typed pages. In the course of this 15 page transcript there are no less than 87 places at which the tape proved inaudible to the transcriber.

"We can only conclude that the affirmative requirement of the compensation law that testimony shall be reported and orders reviewed upon a transcript is not met by this record. We do not think that Lieber can be distinguished on the theory that there the transcript was unobtainable, whereas in the instant case a partial transcript was submitted. A partial transcript as incomplete as that submitted here is of no more value than would be an absent transcript."

Wardell v. Tropicana Products, Inc., 256 So. 2d 212, 213-214 (Fla. 1971)

Thus the decision of the Supreme Court of Florida, denying the petitioner's application for a writ of certiorari was in conformity with the established law of Florida in cases where no record or only a partial record was available for the reviewing tribunal.

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Petitioners now ask this Court to consider and determine that the law of Florida in that regard deprives them of due process of law.

However, it is the contention urged by petitioners that would result in a violation of due process rights not the decisions of the Supreme Court of Florida. Respondent appealed the adverse ruling of the Judge of Industrial Claims and sought review by the Industrial Relations Commission. He was entitled to have a record furnished by the State in order that the reviewing authority could determine whether or not the decision of the Judge of Industrial Claims was correct and supported by the evidence. Absent such a record respondent would be deprived of the basic right of appeal.

This situation has been considered from precisely that standpoint by the Supreme Courts of two states. The Supreme Court of Minnesota in a compensation case held:

> "Due process requires that the evidence on which an agency, board, or commission bases its findings be ascertainable. This court must have the necessary data on which to determine the correctness thereof. A claimant for workmen's compensation, under §176.61 (§4320), is guaranteed a right of review by the Supreme Court, which may examine findings of fact and determine whether they have a sufficient foundation in the evidence. Since no transcript of the evidence is required to be filed by the medical board under L. 1943, c. 633, §11, it is apparent that claimant's right of appeal or review is effectively denied thereby.
>
> "The words 'due process of law' when applied to judicial proceedings mean a course of legal conduct consonant with rules and principles established in our

system of jurisprudence for the protection and enforcement of private rights. Due process requires notice before judgment and an opportunity to be heard in an orderly proceeding adapted to the nature of the case, and the right of appeal from or review of a decision regarded by a litigant as unjust. . . .

"Our power to review findings of the medical board and to determine whether they are supported by sufficient foundation in fact is accordingly frustrated, because such findings are binding on the commission and the board is not required, under the statute, to file with its report a transcript of the evidence, testimony, or exhibits upon which such findings are based. Thus a claimant is denied the right of review guaranteed him by the workmen's compensation law, §176.61 (§4320), and by the due process clauses of both the state and federal constitutions. Const. Minn. art. 1, §2; Const. U.S. Amend. 14."

Hunter v. Zenith Dredge Co., 19 N.W. 2d 795, 799 - 800, (Minn. 1945)

Similarly, the Supreme Court of Idaho in *Ebersole v. State*, 428 P. 2d 947, 953 (1967) held:

"When there is such a breakdown in the application of established procedures, as is reflected by this record, which necessitated resort to parol evidence of court officials and of the appellant himself to establish what took place in a Court of record, there is such a lack of fundamental fairness and deviation from established procedure as to necessitate the conclusion that appellant has not been afforded the protection of the due

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process clauses of the Constitutions of the United States and this State."

In a rate case this Court through Mr. Justice Cardozo said:

> "The fundamentals of a trial were denied to the appellant when rates previously collected were ordered to be refunded upon the strength of evidential facts not spread upon the record, . . .
>
> "This is not the fair hearing essential to due process. It is condemnation without trial. . . .
>
> "From the standpoint of due process - the protection of the individual against arbitrary action - a deeper vice is this, that even now we do not know the particular evidential facts of which the Commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown, there is no way to find them out. . . .
>
> "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"
>
> *Ohio Bell Tel. Co. v. Public Utilities Comm.*, 301 U.S. 292, 300, 302-303, 57 S. Ct. 724, 728, 730, 81 L. Ed. 1093, 1099-1101 (1936)

Here, on the same issue, the Industrial Relations Commission remanded the cause on the grounds of lack of a record. The contention of petitioners that they should be entitled to the benefits of a compensation order which cannot be re-

viewed is without legal or constitutional merit. The tribunals below acted to preserve the only due process rights which were in jeopardy, those of respondent. These actions were constitutionally correct.

2. WHETHER IT IS A VIOLATION OF EQUAL PROTECTION FOR AN INDUSTRIAL RELATIONS COMMISSION TO REVERSE AND REMAND A DECISION OF A JUDGE OF INDUSTRIAL CLAIMS WHICH IS UNSUPPORTED BY A RECORD?

Petitioners have cited four Florida District Court of Appeals cases for the proposition that in civil cases the burden is on the appellant to produce a record for appeal. They contend that to impose a different rule in workmen's compensation matters denies them equal protection of the laws.

This ignores the distinction in the reporting requirements at workmen's compensation hearings and civil trials. By statute, the state agency conducting a compensation hearing is responsible for the reporting and preparation of the record of the hearing. *Florida Statutes*, Section 440.29(2). In civil trials there is no such provision and the burden falls on the parties to provide for a reporter, moreover in one of the cases cited by petitioners the Court explicitly points out that the Florida Appellate Rules provide for an alternative to a stenographic transcript:

> "The appellant urges as an extenuating circumstance for his failure to bring us a proper record that there was no court reporter present at the time of taking of the testimony. *It is not in keeping with the orderly processes of law that there should be a time when an appeal is impossible because a court reporter was not employed by one of the parties. We point out that a*

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> *stenographic transcript of the testimony is not necessary for an appeal. Rule 3.6(h), Florida Appellate Rules, 13 F.S.A., not only provides for the use of narrative statements of the testimony, but frankly endeavors to encourage such simplified appeals." Moyer v. Moyer,* 114 So. 2d 638, 638 - 639 (3rd DCA Florida 1959) (emphasis supplied)

There being no similar provision in workmen's compensation matters for a narrative statement, and further it not being the burden of the parties to provide for reporting of the proceedings the distinction between the two types of cases is clear.

It is also of interest to observe that the Court in that case took particular note of the basic unfairness present where an appeal is impossible because a transcript is unavailable. Yet this is exactly what petitioners urge this Court to bring about; and to do it in a posture where the lack of a record is in no way due the fault or neglect of the respondent.

Moreover, in *Agricultural Delivery Service v. Travelers Insurance Company,* 269 So. 2d 429 (2d DCA, Fla. 1972), principally relied upon by petitioners, the written opinion reflects an entirely different posture of the case than that urged by petitioners. That was a case where the District Court of Appeals of Florida remanded the action to the trial court to reconstruct the record and the trial court erroneously construed that mandate to require a trial de novo. The District Court thereupon directed the trial judge to "withdraw his order for new trial and simply follow our prior mandate to reconstruct original testimony." (p. 430)

This hardly supports petitioners' contention of an invidious discrimination. In order to establish an equal protection vio-

lation it is incumbent on petitioners to establish an arbitrary discrimination against persons in similar circumstances. A state has wide latitude in prescribing the procedural regulation of its courts. As held by this Court in *Mallett v. North Carolina*, 181 U.S. 597, 598, 21 S. Ct. 730, 45 L. Ed. 1015, 1020 (1901) in quoting from the prior case of *Missouri v. Lewis*, 101 U.S. 221 (1879):

> "Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the Amendments thereto . . . If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefits of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line there may be a right of

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> trial by jury, and on the other no such right. Each State prescribes its own modes of judicial proceedings. If diversities of laws and of judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State."

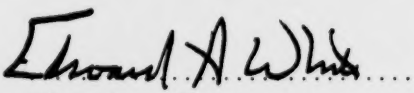
Petitioners have not and cannot show any discrimination between themselves and other parties to Florida workmen's compensation matters. In point of fact they have received the identical treatment accorded all parties to compensation matters by the Florida Courts. *Lieber v. Morris Lieber, Inc.*, supra; *Wardell v. Tropicana Products, Inc.*, supra. There is no discrimination between petitioners and other persons in like circumstances.

Had petitioner's prevailed below, however, serious equal protection issues would have been presented. Not only due to the difference in treatment between that accorded to respondent and other parties to compensation matters where there is no record, but also due to the stifling of respondent's right to appeal. Since *Griffin v. Illinois*, 351 U.S. 12, 76 S. Ct. 585, 100 L. Ed. 891 (1956) the right of an indigent defendant to a transcript in criminal cases has been guaranteed as a part of his equal protection rights. In this case respondent was entitled to a record as a matter of law in order to perfect his appeal. Had petitioners prevailed, respondent's right of appeal would have been just as effectively precluded and frustrated as that of the indigent criminal defendant who could not afford to purchase a transcript. Had that occurred the equal protection violation of respondent Thomas' rights would have been clear.

CONCLUSION

The order of the Supreme Court of Florida guaranteed rather than violated due process and equal protection rights and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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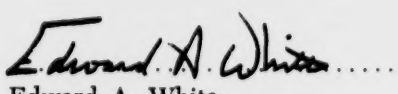
CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that three copies of the foregoing printed brief of Respondent Thomas have been delivered at the office of Luke G. Galant, Esquire, 320 East Adams Street, Jacksonville, Florida, counsel of record for petitioners and three copies thereof have been served by mail by depositing the same in a United States mail box, with first class postage prepaid addressed to Industrial Relations Commission, State of Florida Department of Commerce, 1321 Executive Center Drive - East, Tallahassee, Florida 32301, respondent, this 17th day of March, 1976.



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